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JURISDICTIONAL STATEMENT

Appeal in this case was originally taken to the Missouri Court of Appeals, Southern District pursuant to Article V section 3 of the Missouri Constitution in that the case, and the claims and defenses of the parties, do not involve any claim or defense which was within the exclusive appellate jurisdiction of the Missouri Supreme Court. Appeal to the Southern District of the Missouri Court of Appeals was proper pursuant to Section 477.060 RSMo. As the Circuit Court of Newton County, Missouri, in which the judgment was rendered, is within the territorial boundaries of the Southern District of the Missouri Court of Appeals. Jurisdiction of this appeal is now properly before the Missouri Supreme Court pursuant to Rule 83.04 and Order of the Missouri Supreme sustaining application for transfer entered on the 1st day of November, 2005.

STATEMENT OF FACTS

Pearl Walker Copeland (Copeland) commenced employment with Health Care Services of the Ozarks, Inc., d/b/a Oxford Healthcare (Oxford) in 1979. Luann Helms (Helms) commenced employment with Oxford in 1996. (Tr. 109, & 5 and 6)

During the course of their employment, Copeland and Helms had extensive contact with caseworkers and employees of Oxford, and patients, whose care was funded by Medicaid. (L.F. 109, & 7 and Tr. 58-59). Copeland and Helms only worked with patients or clients of Oxford whose care was funded by Medicaid. (Tr. 11, 12, 58, 83, 59, 94)

On June 1, 1993, Copeland signed an agreement titled ANon-Disclosure and Non-Competition Agreement@ with Oxford. (L.F. 109, & 8 and A22) On September 2, 1997 Helms signed the same form of agreement. (L.F. 109, & 9 and Pg. 41)

Each of the agreements contained the following pertinent language:

1. You acknowledge and recognize that the business techniques, employees, information and lists of customers and information concerning them of the Company (hereinafter referred to as AConfidential Information@), are a valuable, special and unique asset of the Company=s business, and were acquired at considerable expense to the Company; and that said Confidential Information is confidential and is a valuable trade and business secret belonging to the Company. Therefore, you agree that you will not at any time during your employment with the Company or at any time after leaving its service, for yourself or any other person or entity divulge such Confidential Information.

2. You agree as part of the consideration of this agreement, that in the event of termination of the employment relationship for any reason whatsoever, you will not for a period of two (2) years from said date of the termination, either directly or indirectly on your own account or as agent stockholder, owner, employer, employee or otherwise, engage in a business competitive to that of the Company within 100 miles from Joplin Missouri. You further agree within said period of two (2) years that you will not in any way divert or attempt to divert from the Company any business or employees whatsoever. You agree not to influence any of the customers or employees of the Company during said two (2) year period. You further agree that you will not make or permit the making of any public announcement or statement of any kind that you were formerly employed or connected with Company.

7. It is expressly understood and agreed, that Employee is an employee Aat will," and may be terminated for any reason, with or without cause, upon immediate notice of Company. . . ."

On January 21, 2000, Copeland resigned her position as Regional Director of Oxford=s office in Joplin, Missouri. At the time of her resignation, Copeland=s salary with Oxford was $40,974.00 per year. (L.F. 109, & 11. Tr. 84) Also on January 21, 2000, Helms submitted her resignation to Oxford as its In-Home Services Nursing Supervisor of Oxford=s Joplin, Missouri office, to be effective February 21, 2000. At the time of Helms= resignation, her salary with Oxford was in the amount of $35,500.00 per year. (L.F. 110, & 13) Copeland and Helms

resigned their positions with Oxford because Oxford was terminating hourly wage earners who refused to sign non-compete agreements with Oxford. (Tr. 83-84, 132)

Copeland received an offer to go to work for ASA Healthcare, Inc., d/b/a Integrity Home Care (Integrity), a Missouri for-profit corporation, at the time of her resignation of her position with Oxford. (L.F. 110, **&** 17, Tr. 85) Copeland had begun attending meetings with persons involved with Integrity following her resignation of employment from Oxford. (Tr. 110, **&** 15) Likewise, Helms commenced attending meetings with representatives of Integrity following her resignation. Helms also received a commitment from Integrity for a new employment position. (L.F. 111, **&** 21; Tr. 128)

Oxford is a not-for-profit, public benefit corporation qualified for tax exempt status under Section 501 (c)(3) of the Internal Revenue Code. (L.F. 108 ¶ 1; A32)

Oxford instituted suit against Copeland for violation of the non-disclosure and non-competition agreement in the Circuit Court of Newton County, State of Missouri on February 16, 2000. (L.F. 112, **&** 28 and L.F. 13-19) The petition of Oxford alleged involvement on the part of Copeland with Integrity Home Care, and asserted a violation of the non-solicitation and non-compete provisions of the agreement. The claims for relief were asserted in three counts; Count I for breach of contract and damages, Count II for a temporary restraining order, and Count III for preliminary and permanent injunction. A temporary restraining order was entered against Copeland enforcing the non-compete agreement. (L.F. 112, **&** 28) No testimony was presented at the time of the hearing on the temporary restraining order. (Tr. 86, L.F. 112 P. 28)

Suit was instituted by Oxford against Helms on March 10, 2000. (L.F. 112, **&** 29) The suit filed by Oxford against Helms contained the same types of allegations as the suit filed

against Copeland. It also included the same three counts or claims for relief. (L.F. 34-42) On March 23, 2000, the Circuit Court of Newton County entered a temporary restraining order against Helms enforcing the non-compete agreement. (L.F. 112, & 29) As in the case with Copeland, no testimony was presented to the trial court at the time of the hearing on the temporary restraining order. (Tr. 132-133)

In each suit, the trial court set the bond for the TRO in the amount of $7,500.00. A cash bond was posted in each suit. (L.F. 22-23)

On March 23, 2000, the Circuit Court of Newton County consolidated the suit originally instituted against Copeland with the suit instituted against Helms. (L.F. 112, & 30) The Court also entered an order staying the prosecution of each suit pending the resolution of a federal court suit which had been commenced by Copeland and Helms against the Commissioner of the Internal Revenue Service and Oxford wherein Copeland and Helms had sought the revocation of Oxford=s tax exempt status and damages for violation of federal antitrust statutes. (L.F. 112, & 30 and L.F. 81-91) The temporary restraining orders issued by the Court against Copeland and Helms were extended by subsequent orders of the court every fifteen (15) days. (Tr. 112-113)

Following entry of the restraining orders against each of them, Copeland and Helms ceased their employment relationship with Integrity. (Tr. 86, 129) During the two year period following entry of the initial temporary restraining orders by the Circuit Court of Newton County, Copeland had no outside gainful employment. (Tr. 87; 120-121) Copeland lost an opportunity to work for Integrity at the $40,974.00 salary level which she had been receiving from Oxford. (Tr. 90)

Helms had also obtained an agreement from Integrity for employment at a comparable salary to what she had received at Oxford, that is, the sum of $35,500.00. (Tr. 129) She left her employment with Integrity after the initial TRO was entered. (Tr. 129) Helms obtained other employment after the TRO was entered that was not in violation of its terms, and obtained total income for the year 2000 in the amount of $20,000.00, a difference in her 1999 salary with Oxford of $15,500.00. (Tr. 132) In 2001, Helms' other employment generated income in the amount of $28,000.00, a difference in her 1999 salary with Oxford in the amount of $7,500.00. (Tr. 132)

On January 11, 2001 an order was entered in the federal court suit instituted by Copeland and Helms against the Commissioner of the Internal Revenue Service and Oxford, dismissing the suit for lack of standing. (L.F. 92-107)

During the course of their employment with Oxford, Copeland and Helms only worked on patients referred to Oxford whose services were paid by Medicaid. (Tr. 11-12, 58, 83) The State referred the Medicaid eligible patients to Oxford after determining their qualifications to receive in-home health care from a certified in-home health care service provider. (Tr. 12-13) Oxford was the largest in-home health care provider, in Southwest Missouri since 1996. (Tr. 52-53) Neither Copeland or Helms had any involvement with Oxford=s private pay patients which Oxford may have serviced. (Tr. 92-93 and 135-136)

Both Copeland and Helms were aware at the time of their resignation from employment that they had signed the non-compete agreements, although both of them believed that the agreements were not enforceable. (Tr. 91 and 141) Copeland and Helms filed a motion before the trial court to increase the injunction bond amounts posted for the injunctive relief obtained

against each of them. The court overruled the motion and refused to increase the amount of the bonds. (L.F. 5-6)

Neither Copeland or Helms were aware of any trade secrets that they had obtained during the course of their employment with Oxford. (Tr. 92 and Tr. 134-135) Neither Copeland or Helms took any list of patients which may have been serviced by Oxford. (Tr. 92 and 135)

Copeland and Helms each asserted counterclaims against Oxford for tortious interference and for declaratory judgment to the effect that Oxford, as a not-for-profit public benefit corporation, was not entitled, as a matter of public policy, to obtain or enforce any non-disclosure or non-competition agreement which they may have signed. (L.F. 49-55 and L.F. 56-65)

Trial of the consolidated suits instituted against Copeland and Helms and their respective counterclaims against Oxford for tortious interference and declaratory judgment was had before the Court on January 8, 2004. (L.F. 131) Oxford presented testimony by its Vice-President of Support Services, Mr. Richard McGee, on its behalf. (Tr. 10-11)

Oxford=s witness, Mr. McGee, was not aware of whether other employees which had left Oxford, to go to work for Integrity, after Copeland and Helms resigned, did so because of the departure of Copeland and Helms, or because of the firing by Oxford of two other employees, Muriel Davenport and Kay Gratton. (Tr. 26-27)

Oxford=s vice president, Mr. McGee, was not aware if some of the employees who left Oxford, after Copeland and Helms resigned, may have done so because of their dislike of the former president of Oxford, Charles Goforth. (Tr. 27-29)

Oxford=s trial exhibits purporting to exemplify damages (Plaintiff=s Exhibits P-1, P-2 and P-3) were all based upon information provided by someone else to its representative (McGee) and sole witness at trial. (Tr. 51-52) Oxford=s witness admitted that Oxford had been the largest in-home health care provider in Southwest Missouri since 1996. (Tr. 52-53) Integrity had been very aggressive in acquiring market share in the provision of in-home health care services in Southwest Missouri after 2000. (Tr. 53) McGee was not aware if any of the people listed within Plaintiff=s Exhibit P-1 got a raise when they went to work for Integrity. (Tr. 54) McGee did not know why the people listed on Plaintiff=s Exhibit P-1 left the employment of Oxford. (Tr. 54-55) The list of patients which Oxford claimed it lost because of Copeland and Helms after 2000, and the damage calculations presented by Oxford through testimony of Richard McGee, were not based upon personal knowledge on the part of McGee as to why the patients stopped utilizing the services of Oxford. (Tr. 55-58)

Gee admitted, on behalf of Oxford, that in-home-health care patients with which Copeland and Helms were involved, were actually referred to Oxford by the Missouri Division of Aging. (Tr. 58-59) The loss of income claimed by Oxford as damages at the time of the trial actually amounted to a loss of profit claimed by Oxford. (Tr. 63-64) Oxford=s representative at trial (McGee), did not know how many patients of Oxford were lost because of other employees which may have left due to the departure of Muriel Davenport and Kay Gratton. (Tr. 64-65, 67) McGee was not aware of how many of the employees lost by Oxford, after the departure of Helms and Copeland, may have left for higher wages. (Tr. 66) McGee was not aware of how many employees may have left because they did not like the former president of Oxford, Charles Goforth. (Tr. 66-67) The only employees that left Oxford in

2000 that had signed non-disclosure and non-compete agreements with Oxford were Copeland and Helms. (Tr. 67-68)

Oxford=s former president, Charles Goforth, testified by deposition, that he did not know who the Aclient@ relationships originated with in the first instance, either the State of Missouri, or the in-home health care provider which delivered the service, such as Oxford. (Tr. 67) Oxford=s former president, Charles Goforth, said the trade secrets lost by Oxford were the marketing and supervision systems of Oxford. (Tr. 77-79)

Copeland did not talk with any patients receiving in-home health care from Oxford and encourage them to leave Oxford and seek services from Integrity. (Tr. 90) Copeland did not encourage or ask employees of Oxford to quit in order to go to work for Integrity. (Tr. 90) Copeland did not take any list of patients serviced by Oxford at the time she left her employment with Oxford. (Tr. 92) Copeland did not at any time have any involvement with any of the private pay patients serviced by Oxford. (Tr. 92) Like Luann Helms, Copeland was only involved with patients who were referred to Oxford by the Missouri Division of Aging, and payment for whom was provided by Medicaid. (Tr. 92-93) The only patients or clients which Copeland had been involved with while at Oxford were patients or clients only if the State of Missouri, Division of Aging, said they were. (Tr. 94) All the patients or clients with whom Copeland had been involved with, while at Oxford, had to come from the Missouri Division of Aging before receiving any services and before any fees could be paid to Oxford for servicing them. (Tr. 95)

Integrity, for whom Copeland had obtained a commitment for employment, was a for-profit corporation. (Tr. 96) Copeland could not remember a time when her salary with Oxford

had ever been as little as the $7,500.00 bond amount set by the trial court when the initial temporary restraining order was entered. (Tr. 97) Copeland admitted that she had allowed her home to be used by Integrity to solicit employees from Oxford after her resignation from employment with Oxford. (Tr. 112-113)

Helms, like Copeland, knew of no trade secrets held by Oxford. (Tr. 134-135) Helms did not take any customer lists when she left Oxford. (Tr. 135) The customers or clients of Oxford which Helms had worked with had all come from the Missouri Division of Aging. (Tr. 135) The Missouri Division of Aging had in each instance decided who could be a patient or client for in-home health care services and with whom Helms could have been involved. (Tr. 135-136)

Copeland lost two years of salary of $40,974.00 per year because of the suit and injunction obtained by Oxford (Tr. 86, 87, 90, 120-121) Helms lost salaried income in the amount of $15,500.00 in 2000 and $7,500.00 in 2001 (total of $23,000.00) because of the suit and injunction obtained by Oxford. (Tr. 129, 132)

Following conclusion of the trial, Findings of Fact and Conclusions of Law were entered by the Court (L.F. 131-147) and judgment was entered. (L.F. 148-150) The Court found that Helms and Copeland had breached their non-disclosure/non-compete agreements but did not find or award any damages for the breach in favor of Oxford. All relief requested in counterclaims asserted by Copeland and Helms were denied by the Court. (L.F. 131-150) Appeal was taken from the findings and judgment of the trial court by Copeland and Helms by their Notice of Appeal filed on July 28, 2004. (L.F. 151) Appeal was taken by Oxford of the decision of the trial court thereafter. (L.F. 161) Following briefing by the parties and oral

argument before the Missouri Court of Appeals, Southern District, an opinion was issued on the 27th day of July, 2005. The opinion was modified by order of the Missouri Court of Appeals by order entered on the 22nd day of August, 2005. Application for transfer to the Missouri Supreme Court, submitted by Oxford, was granted by order of the Missouri Supreme Court entered on the 1st day of November, 2005.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN ITS FINDING THAT THE WRITTEN AGREEMENTS SIGNED BY COPELAND AND HELMS WERE ENFORCEABLE AND ITS DECISION WAS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE HEALTHCARE SERVICES OF THE OZARKS, INC. D/B/A OXFORD HEALTHCARE HAD NO PROTECTABLE INTERESTS IN (a) TRADE SECRETS, OR (b) CUSTOMER AND/OR CLIENT CONTACTS (c) WAS IN VIOLATION OF STATE LAW PROHIBITING CONTRACTS IN RESTRAINT OF TRADE, ' 416.031 RSMO., INTHAT THERE WAS NO EVIDENCE OR TESTIMONY PRESENTED BY OXFORD TO ESTABLISH ANY TRADE SECRET OF OXFORD WHICH WAS SUBJECT TO USE OR APPROPRIATION BY COPELAND OR HELMS IN THE COURSE OF ANY COMPETITIVE EMPLOYMENT RELATIONSHIP WITH ANY COMPETITOR AND THE EVIDENCE WHOLLY FAILED TO ESTABLISH OR SHOW ANY CUSTOMER TAKEN OR CLIENT LISTS TAKEN AND SUBJECT TO UTILIZATION BY COPELAND OR HELMS IN THE COURSE OF ANY COMPETITIVE EMPLOYMENT RELATIONSHIP. THE ONLY PROTECTABLE INTERESTS IN MISSOURI WHICH ARE SUBJECT TO ENFORCEMENT BY VIRTUE OF A NON-COMPETITION OR NON-SOLICITATION AGREEMENT ARE, AS A MATTER OF LAW, LIMITED TO TRADE SECRETS OR CUSTOMER OR CLIENT CONTACTS. FURTHER, MISSOURI LAW, SECTION 416.031 RSMO., PROHIBITS THE ENFORCEMENT OF ALL CONTRACTS WHICH SEEK TO EFFECT A RESTRAINT OF TRADE AND THE

STATUTE IS NOT CONSTRAINED BY THE PROTECTABLE INTEREST EXCEPTIONS IDENTIFIED IN MISSOURI CASE AUTHORITY.

Schmersahl, Treloar & Co., P.C. v. McHugh, 28 S.W.3d 345 (Mo.App. ED. 2000)

West Group Broad., Ltd. v. Bell, 942 S.W.2d 934 (Mo.App. S.D. 1997)

Continental Research Corp. v. Scholz, 595 S.W.2d 396 (Mo.App. E.D. 1980)

Section 416.031, RSMo.

II.

THE TRIAL COURT ERRED IN FINDING THE WRITTEN AGREEMENTS OF COPELAND AND HELMS WHICH PURPORTED TO RESTRICT COMPETITION AND SOLICITATION OF CUSTOMERS OR EMPLOYEES WERE ENFORCEABLE AS A MATTER OF LAW AND IN DENYING THE RELIEF REQUESTED IN COUNT II OF THE COUNTERCLAIMS OF COPELAND AND HELMS, EACH OF WHICH ASSERTED A CLAIM FOR DECLARATORY JUDGMENT TO THE EFFECT THAT THE AGREEMENTS WERE NOT ENFORCEABLE AS A MATTER OF PUBLIC POLICY IN MISSOURI BECAUSE HEALTHCARE SERVICES OF THE OZARKS, INC., D/B/A/ OXFORD HEALTHCARE IS AN ENTITY CHARTERED IN MISSOURI AS A NOT-FOR-PROFIT CORPORATION AND DESIGNATED AS A APUBLIC BENEFIT@ CORPORATION, QUALIFIED FOR TAX EXEMPT STATUS UNDER ' 501(c)(3) OF THE INTERNAL REVENUE CODE (TITLE 26 U.S.C. ' 501(c)(3)) AND AS SUCH IS NOT ENTITLED TO RESTRAIN TRADE IN THE CONDUCT OF CHARITABLE ACTIVITIES IN THAT ANY ACTIVITY OR UNDERTAKING, ANOT-FOR-PROFIT@ AND AS A APUBLIC BENEFIT@ CORPORATION IS, OR SHOULD BE, AS A MATTER OF PUBLIC POLICY IN MISSOURI, PROHIBITED FROM LIMITING, RESTRAINING, DETERRING OR ENJOINING OTHERS FROM OFFERING THE SAME OR SIMILAR SERVICES WHICH MAY BE DEMANDED BY THE PUBLIC, ON A FOR-PROFIT BASIS, OR OTHERWISE, AS A MATTER OF SOUND PUBLIC POLICY, AND ANY SUCH NOT-FOR-PROFIT PUBLIC BENEFIT CORPORATION SHOULD NOT BE ALLOWED TO LIMIT, RESTRAIN OR ENJOIN THE DELIVERY OF GOOD WORKS

OR GOOD DEEDS TO PERSONS WITHIN THE COMMUNITY AT LARGE WHO MAY BE IN NEED OF THE PARTICULAR TYPE OF SERVICE OR ACTIVITY OFFERED.

Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976)

Section 355.025, RSMo

III.

THE TRIAL COURT ERRED IN FINDING THE CLAIMS OF COPELAND AND HELMS WERE BARRED BY RES JUDICATA ARISING FROM A JUDGMENT OF DISMISSAL FOR LACK OF STANDING OF THEIR SUIT INSTITUTED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI IN WHICH COPELAND AND HELMS SOUGHT A JUDGMENT DECLARING REVOCATION OF THE TAX EXEMPT STATUS OF OXFORD (COUNT I OF THE FEDERAL COURT COMPLAINT) AND DAMAGES FOR VIOLATION OF THE SHERMAN ANTI-TRUST ACT, TITLE 15 U.S.C. SECTIONS 1 AND 2 (COUNT II OF THE FEDERAL COURT COMPLAINT), AND WHICH CLAIMS WERE DISMISSED, IN EACH INSTANCE, BY THE FEDERAL DISTRICT COURT IN ITS ORDER OF DISMISSAL FOR LACK OF STANDING TO ASSERT THE CLAIMS FOR RELIEF, BECAUSE THE DOCTRINE OF RES JUDICATA WAS NOT APPLICABLE AND COULD NOT ARISE BY VIRTUE OF THE DISMISSAL OF THE FEDERAL COURT SUIT FOR LACK OF STANDING ON THE PART OF COPELAND AND HELMS TO SEEK OR OBTAIN THE RELIEF REQUESTED UNDER FEDERAL LAW, IN THAT THE CLAIMS WHICH WERE ASSERTED IN THE FEDERAL DISTRICT COURT WERE FOR (1) DECLARATION OF A JUDGMENT REVOKING THE TAX EXEMPT STATUS OF OXFORD AND (2) DAMAGES FOR VIOLATION OF THE FEDERAL ANTI-TRUST LAW IN THE UNITED STATES, TITLE 15 U.S.C. SECTIONS 1 AND 2 AND THE SUIT WAS DISMISSED FOR LACK OF REQUISITE STANDING ON THE PART OF COPELAND AND HELMS TO BRING THE CLAIMS BEFORE THE FEDERAL

COURT, PREVENTING THE FEDERAL COURT FROM ACQUIRING SUBJECT MATTER JURISDICTION OF THE CLAIMS AND THE DISMISSAL OF THE CLAIMS FOR LACK OF STANDING, BY A COURT WITHOUT SUBJECT MATTER JURISDICTION, IS NOT A DISPOSITION OF THE CLAIMS ON THE MERITS, OR A DISPOSITION ON THE MERITS OF ANY OF THE FACTS RELATIVE TO THE CLAIMS ASSERTED BEFORE THE FEDERAL DISTRICT COURT, BUT MERELY A DETERMINATION THAT COPELAND AND HELMS WERE NOT QUALIFIED TO SEEK THE RELIEF REQUESTED IN THE FEDERAL DISTRICT COURT. RES JUDICATA CAN ONLY ARISE FROM A DISPOSITION OF A PRIOR ACTION IN ANOTHER COURT WHICH HAS ACQUIRED SUBJECT MATTER JURISDICTION, INVOLVING THE SAME PARTIES, AND IN WHICH THE SAME OR SIMILAR RELIEF HAS BEEN SOUGHT, WITH THE COURT, AFTER FULL LITIGATION, DISPOSING OF THE CLAIMS, ON THEIR MERITS.

King General Contractors v. Reorganized Church, 821 S.W.2d 495 (Mo. 1991)

Steel Company v. Citizens For A Better Environment, 118 S.Ct. 1003, 523 U.S. 83, 140 L.Ed.2d 210 (1998)

Deatherage v. Cleghorn, 115 S.W.3d 447 (Mo.App. S.D. 2003)

Collins & Associates Dietatory Consultants, Inc. v. Labor & Industrial Relations Commission, 724 S.W.2d 243 (Mo. 1987)

IV.

THE TRIAL COURT ERRED IN DENYING THE RELIEF REQUESTED IN THE COUNTERCLAIM OF COPELAND AND COUNTERCLAIM OF HELMS FOR

TORTIOUS INTEREFERENCE WITH BUSINESS EXPECTANCY BECAUSE COPELAND AND HELMS (1) HAD A VALID BUSINESS EXPECTANCY IN THE FORM OF A COMMITTED EMPLOYMENT RELATIONSHIP WITH INTEGRITY HOME CARE; (2) OXFORD HAD KNOWLEDGE OF THE BUSINESS RELATIONSHIP ON THE PART OF COPELAND AND HELMS WITH INTEGRITY; (3) THE BUSINESS RELATIONSHIP ON THE PART OF COPELAND AND HELMS WITH INTEGRITY WAS TERMINATED BY REASON OF OXFORD'S INTERFERENCE WITH THE RELATIONSHIP IN BRINGING SUIT AGAINST COPELAND AND SUIT AGAINST HELMS AND WRONGFULLY OBTAINING ORDERS RESTRAINING AND ENJOINING THEM FROM PURSUING THEIR EMPLOYMENT AND BUSINESS RELATIONSHIPS WITH INTEGRITY; (4) WHICH INTERFERENCE WAS WITHOUT JUSTIFICATION AS OXFORD HAD NO PROTECTABLE INTEREST UPON WHICH IT WAS ENTITLED TO ANY INJUNCTIVE RELIEF AND ITS CLAIMS WERE ASSERTED WITHOUT LEGAL JUSTIFICATION AND (5) RESULTED IN DAMAGES BEING SUSTAINED BY COPELAND AND HELMS BY VIRTUE OF THE LOSS OF THEIR EMPLOYMENT INCOME FROM INTEGRITY HOME CARE, IN THAT, OXFORD WAS OBVIOUSLY AWARE OF THE RELATIONSHIP OF COPELAND AND HELMS WITH INTEGRITY AS SHOWN BY ITS SUITS TO HAVE SUCH RELATIONSHIPS ENJOINED AND TERMINATED; THE INJUNCTIVE RELIEF SOUGHT AND OBTAINED INJUNCTIVE RELIEF RESULTED IN A BREACH AND DISCONTINUATION OF THE RELATIONSHIP OF COPELAND AND HELMS WITH INTEGRITY, WHICH CONDUCT WAS WITHOUT JUSTIFICATION DUE TO THE

FACT THAT OXFORD HAD NO PROTECTABLE INTEREST IN THE FORM OF A TRADE SECRET OR CUSTOMER CONTACT AND COPELAND AND HELMS WERE DAMAGED IN THE AMOUNT OF THE SALARY WHICH THEY LOST BECAUSE OF THE WRONGFULLY SOUGHT AND OBTAINED INJUNCTIVE RELIEF. FURTHER, DAMAGES WHICH THEY WERE ENTITLED TO RECOVER WAS NOT LIMITED TO THE AMOUNT OF THE BONDS POSTED IN EACH OF THE SUITS FILED AGAINST COPELAND AND HELMS AS THE BOND AMOUNT IN EACH CASE (THE SUM OF $7,500.00 CASH) WAS SET BEFORE ANY COUNTERCLAIM FOR DAMAGES WAS PENDING BEFORE THE COURT AND THE AMOUNT OF THE BOND SET DID NOT APPROXIMATE THE WAGE LOSS SUSTAINED FOR A TWO YEAR PERIOD BY EITHER COPELAND OR HELMS UNDER ANY CIRCUMSTANCES AND THE BOND AMOUNT WAS SET WITHOUT PRESENTATION OF EVIDENCE OF ANY KIND AND THE COURT REFUSED TO RECONSIDER AND INCREASE THE BOND AMOUNT DURING THE COURSE OF THE LITIGATION.

Rice v. Hodapp, 919 S.W.2d 240 (Mo. 1996)

Wabash R. Co. v. McCabe, 24 S.W. 217 (Mo. 1893)

Section 526.070, RSMo.

Rule 92.02(d) Missouri Rules of Civil Procedure

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ITS FINDING THAT THE WRITTEN AGREEMENTS SIGNED BY COPELAND AND HELMS WERE ENFORCEABLE AND ITS DECISION WAS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE HEALTHCARE SERVICES OF THE OZARKS, INC. D/B/A OXFORD HEALTHCARE HAD NO PROTECTABLE INTERESTS IN (a) TRADE SECRETS, OR (b) CUSTOMER AND/OR CLIENT CONTACTS (c) WAS IN VIOLATION OF STATE LAW PROHIBITING CONTRACTS IN RESTRAINT OF TRADE, ' 416.031 RSMO., INTHAT THERE WAS NO EVIDENCE OR TESTIMONY PRESENTED BY OXFORD TO ESTABLISH ANY TRADE SECRET OF OXFORD WHICH WAS SUBJECT TO USE OR APPROPRIATION BY COPELAND OR HELMS IN THE COURSE OF ANY COMPETITIVE EMPLOYMENT RELATIONSHIP WITH ANY COMPETITOR AND THE EVIDENCE WHOLLY FAILED TO ESTABLISH OR SHOW ANY CUSTOMER TAKEN OR CLIENT LISTS TAKEN AND SUBJECT TO UTILIZATION BY COPELAND OR HELMS IN THE COURSE OF ANY COMPETITIVE EMPLOYMENT RELATIONSHIP. THE ONLY PROTECTABLE INTERESTS IN MISSOURI WHICH ARE SUBJECT TO ENFORCEMENT BY VIRTUE OF A NON-COMPETITION OR NON-SOLICITATION AGREEMENT ARE, AS A MATTER OF LAW, LIMITED TO TRADE SECRETS OR CUSTOMER OR CLIENT CONTACTS. FURTHER, MISSOURI LAW, SECTION 416.031 RSMO., PROHIBITS THE ENFORCEMENT OF ALL CONTRACTS WHICH SEEK TO EFFECT A RESTRAINT OF TRADE AND THE

STATUTE IS NOT CONSTRAINED BY THE PROTECTABLE INTEREST EXCEPTIONS IDENTIFIED IN MISSOURI CASE AUTHORITY.

Standard of Review

An appeal from a judgment entered after trial before the court is controlled by the standard of review set forth in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976). The judgment of the trial court is not to be reversed unless there is no substantial evidence to support it, unless the judgment is against the weight of the evidence, or unless the trial court erroneously declared or erroneously applied the law.

Argument

The agreement signed by Copeland and Helms in this case titled "Non-Disclosure and Non-Competition Agreement" purported to effect a prohibition against solicitation of employees after Copeland and Helms resigned and left the employment of Oxford, as well as to restrict their ability to offer their services in the course of gainful employment to any competitor. A covenant not to solicit or encourage other employees to terminate employment is a restrictive covenant, operating as a restraint of trade. *Schmersahl, Treloar & Co. P.C. v. McHugh*, 28 S.W.3d 345 (Mo.App. E.D. 2000). The Missouri Court of Appeals held in the *Schmersahl* case that a provision in an employment agreement prohibiting solicitation of employees is not enforceable. Similar provisions in the agreements of Copeland and Helms, according to the reasoning set forth in the *Schmersahl* case are likewise, not enforceable.

Missouri courts have consistently held for several decades that covenants not to compete in employment agreements are contracts in restraint of trade and are not favored as they are considered to be a violation of public policy. *West Group Broad., Ltd. v. Bell*, 942

S.W.2d 934 (Mo.App. S.D. 1997). As indicated in the *West Group* case, a covenant not to compete will not be enforceable if it is for the sole purpose of protecting an employer from competition from a former employee. The restrictive covenant in the agreements at issue were solely for the purpose of protecting Oxford from competition from former employees and therefore, in accord with the reasoning in the *West Group* case, not enforceable.

Oxford failed to show the trial court any "protectable interests", in the form of trade secrets or customer contacts which were in jeopardy and which were sought to be protected by the agreements.

It is respectfully submitted that the exceptions which have been carved out in Missouri case law allowing for enforcement of employee covenants not to compete under limited circumstances, i.e., well defined protectable interests in the form of trade secrets and customer contacts, has run afoul of legislative pronouncements to the contrary.

Section 416.031 RSMo. provides within its first paragraph the following:

A1. Every contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful.@ This provision from the AMissouri Antitrust Law@ sets forth the clear policy statement of the legislature which has not been reconciled with the court-created exceptions to covenants not to compete involving limited protectable property interests.

It is submitted that it cannot be legitimately disputed that trade secrets and customer contacts are a type of tangible and intangible personal property interests which are, in the modern market place, sought to be protected. They are also bought, sold and traded in the course of ordinary commerce. It is now well recognized that intangible property, such as a chose in action, is a type of personal property interest which is subject to protection of the

Fourteenth Amendment of the United States Constitution. *Tulsa Collection Servs. v. Pope*, 485 U.S. 478, 99 L.Ed.2d 565, 108 S.Ct. 1340 (1988). The extension of employee restrictive covenants, by judicial interpretation, to personal property interests such as trade secrets and customer contacts (amounting to business good will) is in effect, identifying a type of personal property interest which the Missouri Antitrust Act specifically prohibits from any protection by any contractual restraint of trade as indicated in § 416.031. This legislative policy pronouncement has been in effect for more than one hundred years.

Outstanding case authority has well established that competitive labor may not be restrained. The enforcement by our courts of a covenant not to compete, obtained from an employee, even though limited to identifiable property interests, runs directly afoul of the Missouri Antitrust Act which provides a statutory prohibition against the protection from competition. The courts in Missouri, (not the legislature) have carved out identifiable exceptions to legislative declaration that covenants not to compete, are unenforceable, i.e., trade secrets and customer contacts.

Our Missouri courts should, as a matter of policy, recognize the statutory prohibition which exists and stop the judicial legitimization of employee covenants not to compete, even in regard to trade secrets or customer contacts, i.e. personal property interests which are specifically prohibited from the protection afforded by our courts. The heretofore judicial creation of personal property interests excepted from clearly stated policy by the legislature is improper. It is respectfully submitted the Missouri courts should now appropriately re-embrace the Missouri Anti-Trust Act and the more aggressive disfavor for employee covenants not to compete as referenced historically in *Continental Research Corp. v. Scholz*, 595 S.W.2d

396 (Mo.App. E.D. 1980) in which the court quoted the indignant exclamation of the court in *Dyer=s* case, Y. B. Mich. 2 Hen. 5 f. 5, pl. 26 (C.P. 1414) as follows:

> ABy God, if the plaintiff [seeking to impose a non-compete restriction] were here he would go to prison until he paid a fine to the king.@

Alternatively, assuming the Missouri Court of Appeals will continue to adhere to outstanding case authority finding the property interests of trade secrets and customer contacts to be subject to protection under an employee covenant not to compete, the decision of the trial court, finding a breach of the covenant not to compete, must still be reversed.

First, in regard to customer contacts or goodwill, the evidence submitted before the court substantiated that Copeland and Helms were involved only with in-home health care patients who received services from Oxford, and whose services were paid for by Medicaid through what was then known as the Missouri Division of Aging. The Missouri Division of Aging qualified and determined who might be a client or patient that could be serviced by any in-home health care provider. (Tr. 11-13, 58, 83) Oxford or any other in-home health care provider could only service those patients or clients if the State of Missouri said they could. The services Oxford rendered for in-home health care patients and that were administered by Copeland and Helms through their work, were ultimately paid from funds of the public treasury. The facts in this case do not present the type of customer contacts or trade secrets which are indeed items of property that are freely transferable in other instances, and has heretofore been recognized by our courts as subject to some limited protection through employee covenants not to compete.

In regard to protection of Oxford=s so-called Atrade secrets,@ the record before the court is completely devoid of the identification of any legitimate trade secret. The only reference to any claim of a trade secret was from the testimony provided by Charles Goforth, Oxford=s former president, who indicated the trade secrets were limited to the Amarketing and supervision systems of Oxford.@ (Tr. 77-79) Marketing and supervision systems are not trade secrets simply because they are not secret. Presumably other employees of Oxford would have been familiar with such systems, such as Muriel Davenport or Kay Gratton who were fired by Oxford for not signing a covenant not to compete. (Tr. 26-27) Copeland and Helms were the only employees of the several which left Oxford in 2000 that had signed any non-compete agreements. (Tr. 67-68) There was no evidence presented by Oxford to indicate the non-compete provisions of the agreements signed by Copeland and Helms was applicable to any proprietary interest of Oxford that amounted to trade secrets.

There was no evidence presented by Oxford indicating any legitimate customer or client contacts which were in jeopardy or any trade secrets to which they were exposed which would make the agreement providing for non-competition enforceable as to them.

POINT II

THE TRIAL COURT ERRED IN FINDING THE WRITTEN AGREEMENTS OF COPELAND AND HELMS WHICH PURPORTED TO RESTRICT COMPETITION AND

SOLICITATION OF CUSTOMERS OR EMPLOYEES WERE ENFORCEABLE AS A MATTER OF LAW AND IN DENYING THE RELIEF REQUESTED IN COUNT II OF THE COUNTERCLAIMS OF COPELAND AND HELMS, EACH OF WHICH ASSERTED A CLAIM FOR DECLARATORY JUDGMENT TO THE EFFECT THAT THE AGREEMENTS WERE NOT ENFORCEABLE AS A MATTER OF PUBLIC POLICY IN MISSOURI BECAUSE HEALTHCARE SERVICES OF THE OZARKS, INC., D/B/A/ OXFORD HEALTHCARE IS AN ENTITY CHARTERED IN MISSOURI AS A NOT-FOR-PROFIT CORPORATION AND DESIGNATED AS A APUBLIC BENEFIT@ CORPORATION, QUALIFIED FOR TAX EXEMPT STATUS UNDER ' 501(c)(3) OF THE INTERNAL REVENUE CODE (TITLE 26 U.S.C. ' 501(c)(3)) AND AS SUCH IS NOT ENTITLED TO RESTRAIN TRADE IN THE CONDUCT OF CHARITABLE ACTIVITIES IN THAT ANY ACTIVITY OR UNDERTAKING, ANOT-FOR-PROFIT@ AND AS A APUBLIC BENEFIT@ CORPORATION IS, OR SHOULD BE, AS A MATTER OF PUBLIC POLICY IN MISSOURI, PROHIBITED FROM LIMITING, RESTRAINING, DETERRING OR ENJOINING OTHERS FROM OFFERING THE SAME OR SIMILAR SERVICES WHICH MAY BE DEMANDED BY THE PUBLIC, ON A FOR-PROFIT BASIS, OR OTHERWISE, AS A MATTER OF SOUND PUBLIC POLICY, AND ANY SUCH NOT-FOR-PROFIT PUBLIC BENEFIT CORPORATION SHOULD NOT BE ALLOWED TO LIMIT, RESTRAIN OR ENJOIN THE DELIVERY OF GOOD WORKS OR GOOD DEEDS TO PERSONS WITHIN THE COMMUNITY AT LARGE WHO MAY BE IN NEED OF THE PARTICULAR TYPE OF SERVICE OR ACTIVITY OFFERED.

Standard of Review

An appeal from a judgment entered after trial before the court is controlled by the standard of review set forth in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976). The judgment of the trial court is not to be reversed unless there is no substantial evidence to support it, unless the judgment is against the weight of the evidence, or unless the trial court erroneously declared or erroneously applied the law.

Argument

Oxford has held itself out to the public at large as being engaged in the delivery of services on a not-for-profit, public benefit basis. Tax exempt status has been granted to Oxford based upon its representations as such. Oxford sought and obtained injunctive relief against Copeland and Helms because they sought to be engaged in competitive efforts, although on a for-profit basis, with Integrity Home Care. It is respectfully submitted that a company which has sought and obtained tax exempt status based upon the representation that it is going to be engaged in the delivery of services on a not-for-profit basis, and providing general charitable services to persons in need within the public at large should not be allowed, as a matter of public policy, to restrain, enjoin or otherwise prohibit, any individuals who seek to provide the same or similar services, whether on a for-profit or not-for-profit basis. As a matter of public policy, any not-for-profit entity should not be allowed to restrain or enjoin commerce, charitable, competitive or otherwise.

There are no Missouri cases that support the claims for declaratory relief sought by Copeland and Helms. However, there are no Missouri cases which indicate that the relief sought is unavailable.

Copeland and Helms' claims for declaratory relief are premised upon sound public policy reasoning and what should be a recognized need on the part of our courts to advance sound public policy and sound economics in a competitive capitalistic society.

A not-for-profit corporation is one, which by its public statements, seeking qualification as such, is supposed to be intent upon the delivery of needed goods or services for the benefit of the community at large. The public representations of Oxford as to its purpose of providing charitable work needed by the community, and obtaining a business advantage in the form of extremely favorable tax status, is repugnant to its anti-competitive efforts. It is not supposed to be motivated by profit. Non-compete agreements are, by their very essence, designed to protect business endeavors that are undertaken for the purpose of generating wealth, measured in the form of profits. The conduct on the part of Oxford in obtaining non-compete agreements from Copeland and Helms was nothing more than an effort to protect market share, hold down competition, and thereby protect its profits.

Section 355.025 RSMo., requires a not-for-profit corporate entity to refrain from engaging in activity for profit. Specifically, the last sentence of Section 355.025 provides, in pertinent part as follows: ANo group, association or organization created for or engaged in business or activity for profit, . . .shall be organized or operate as a corporation under this chapter.@

Oxford, in obtaining a non-compete agreement from employees Copeland and Helms, was engaging in Aactivity for profit,@ as much as any other business person or entity is engaged in an activity for profit when it seeks to obtain from an employee a non-compete agreement. It

is respectfully submitted that an activity for profit is any activity which is designed to generate, promote or protect profit.

The employee non-compete agreements obtained by Oxford from Copeland and Helms were beyond its statutory purposes as indicated by § 355.025 RSMo. The non-compete agreements also defy any informed common sense approach to legitimate business interests of a not-for-profit corporation.

It is respectfully submitted that the trial court erred in denying the declaratory judgment relief sought by Copeland and Helms in their respective counterclaims, to the effect that the non-disclosure and non-compete agreements signed by Copeland and Helms were not enforceable as a matter of public policy.

POINT III

THE TRIAL COURT ERRED IN FINDING THE CLAIMS OF COPELAND AND HELMS WERE BARRED BY RES JUDICATA ARISING FROM A JUDGMENT OF DISMISSAL FOR LACK OF STANDING OF THEIR SUIT INSTITUTED IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI IN WHICH COPELAND AND HELMS SOUGHT A JUDGMENT DECLARING REVOCATION OF THE TAX EXEMPT STATUS OF OXFORD (COUNT I OF THE FEDERAL COURT COMPLAINT) AND DAMAGES FOR VIOLATION OF THE SHERMAN ANTI-TRUST ACT, TITLE 15 U.S.C. SECTIONS 1 AND 2 (COUNT II OF THE FEDERAL COURT COMPLAINT), AND WHICH CLAIMS WERE DISMISSED, IN EACH INSTANCE, BY THE FEDERAL DISTRICT COURT IN ITS ORDER OF DISMISSAL FOR LACK OF STANDING TO ASSERT THE CLAIMS FOR RELIEF, BECAUSE THE DOCTRINE OF RES JUDICATA WAS NOT APPLICABLE AND COULD NOT ARISE BY VIRTUE OF THE DISMISSAL OF THE FEDERAL COURT SUIT FOR LACK OF STANDING ON THE PART OF COPELAND AND HELMS TO SEEK OR OBTAIN THE RELIEF REQUESTED UNDER FEDERAL LAW, IN THAT THE CLAIMS WHICH WERE ASSERTED IN THE FEDERAL DISTRICT COURT WERE FOR (1) DECLARATION OF A JUDGMENT REVOKING THE TAX EXEMPT STATUS OF OXFORD AND (2) DAMAGES FOR VIOLATION OF THE FEDERAL ANTI-TRUST LAW IN THE UNITED STATES, TITLE 15 U.S.C. SECTIONS 1 AND 2 AND THE SUIT WAS DISMISSED FOR LACK OF REQUISITE STANDING ON THE PART OF COPELAND AND HELMS TO BRING THE CLAIMS BEFORE THE FEDERAL

COURT, PREVENTING THE FEDERAL COURT FROM ACQUIRING SUBJECT MATTER JURISDICTION OF THE CLAIMS AND THE DISMISSAL OF THE CLAIMS FOR LACK OF STANDING, BY A COURT WITHOUT SUBJECT MATTER JURISDICTION, IS NOT A DISPOSITION OF THE CLAIMS ON THE MERITS, OR A DISPOSITION ON THE MERITS OF ANY OF THE FACTS RELATIVE TO THE CLAIMS ASSERTED BEFORE THE FEDERAL DISTRICT COURT, BUT MERELY A DETERMINATION THAT COPELAND AND HELMS WERE NOT QUALIFIED TO SEEK THE RELIEF REQUESTED IN THE FEDERAL DISTRICT COURT. RES JUDICATA CAN ONLY ARISE FROM A DISPOSITION OF A PRIOR ACTION IN ANOTHER COURT WHICH HAS ACQUIRED SUBJECT MATTER JURISDICTION, INVOLVING THE SAME PARTIES, AND IN WHICH THE SAME OR SIMILAR RELIEF HAS BEEN SOUGHT, WITH THE COURT, AFTER FULL LITIGATION, DISPOSING OF THE CLAIMS, UPON THEIR MERITS.

Standard of Review

An appeal from a judgment entered after trial before the court is controlled by the standard of review set forth in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976). The judgment of the trial court is not to be reversed unless there is no substantial evidence to support it, unless the judgment is against the weight of the evidence, or unless the trial court erroneously declared or erroneously applied the law.

Argument

The trial court agreed with the assertions made by Oxford that the counterclaims of Copeland and Helms were barred by res judicata . The trial courts determination was based

upon the facts presented to the effect that Copeland and Helms had instituted suit in the United States District Court for the Western District of Missouri against Healthcare Services of the Ozarks, Inc. d/b/a Oxford Healthcare and the United States of America, by Charles O. Rossotti, in his capacity as Commissioner of the Internal Revenue Service. (L.F. p.81) The suit instituted in federal district court was after institution of suit by Oxford against Copeland. Following the filing of the suit against Helms in State Circuit Court in Newton County, she joined as a plaintiff in the federal court suit with Copeland. (L.F. p. 142) The dismissal of the federal court suit was effected by Order entered on January 11, 2001. (L.F. p. 107) Approximately three years later, suits instituted by Oxford and the counterclaims asserted by Copeland and Helms, went to trial before the Circuit Court in Newton County. (L.F. p. 131)

The order of dismissal of the federal court suit had no res judicata effect upon the claims asserted by Copeland and Helms. The complaint in federal court asserted two claims for relief, i.e., Count I - seeking judgment revoking the tax exempt status of Healthcare Services of the Ozarks, Inc. d/b/a Oxford Healthcare and Count II – asserting damage claims for violation of the Federal Anti-trust Act, Title 15 U.S.C. sections 1 and 2. Both of the claims were subject to the original jurisdiction of the federal district court.

The federal court determined specifically on page six of its order (L.F. p. 97) that Count I of the amended complaint had to be dismissed. The Court stated specifically: AHaving concluded that standing is clearly lacking, the Court need not address the other reasons advanced by defendants for dismissing Count I of the amended complaint.@ (L.F. 97) As to Count II, the Court also determined that the plaintiffs, Copeland and Helms, lacked standing to

assert the antitrust claims. The federal court concluded in its Order on page 12 (L.F. p. 103) as follows: APlaintiffs lack standing to assert the claims in both Counts I and II.@

Res judicata requires the existence of four elements before it may be applied as set forth in *King General Contractors v. Reorganized Church*, 821 S.W.2d 495 (Mo. 1991) wherein the court stated, at page 501 as follows: AFor res judicata to adhere, >four identities= must occur: (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the actions; (4) identity of the quality of the person for or against whom the claim is made.@

A casual review of the federal court pleadings and the federal court order (L.F. 81-103) reveals, as to element number one that Copeland and Helms sought the recovery of a different type of judgment in the federal court case. Therefore there was no identity of the Athings sued for@. The causes of action were clearly distinct and completely unavailable for merger in one single suit due to jurisdiction of the federal district court.

There was no identity of the cause of action or persons as required by the second and third elements. The United States of America by the Commissioner of the Internal Revenue Service is not now and never was a party in the state court litigation in Newton County. As indicated in the *King General Constructors* case, application of the doctrine of rest judicata requires the presence of all four elements.

In addition, application of the doctrine of rest judicata can arise only from a judgment entered after parties have had a full and fair opportunity to litigate. *Lay v. Lay*, 912 S.W.2d 466 (Mo. 1995). As the federal court suit was dismissed for lack of standing, there was no litigation of any issues. The determination by the federal court that Copeland and Helms lacked

standing was a determination that the court did not have subject matter jurisdiction, *Steel Company v. Citizens For A Better Environment*, 118 S.Ct. 1003, 523 U.S. 83, 140 L. Ed.2d 210 (1998).

More recently, in *Deatherage v. Cleghorn*, 115 S.W.3d 447 (Mo.App. S.D. 2003) the Court restated the general rule on claims preclusion (res judicata) or issue preclusion (collateral estoppel) and stated at page 454 the following: "For either doctrine to apply, a final judgment on the merits must have been rendered involving the same claim or issue sought to be precluded in the cause in question." (emphasis added)

It should be remembered that a dismissal for lack of standing is not a disposition of the merits of a case. Standing has been referred to as a matter jurisdictional in limine. *Phillips v. Bradshaw*, 859 S.W.2d 232 (Mo.App. S.D. 1993). Missouri Sate Courts and federal courts have consistently held that a party who asserts a claim without standing fails to confer subject matter jurisdiction on the Court. It is obvious that a Court that has determined to be without subject matter jurisdiction cannot address the merits of any claim. *Steel Company v. Citizens For A Better Environment*, 118 S. Ct. 1003, 523 U.S. 83, 140 L. Ed.2d 210 (1998) at page 1007. The Missouri Supreme Court held in *Collins & Associates Dietatory Consultants, Inc. v. Labor & Industrial Relations Commission*, 724 S.W.2d 243 (Mo. 1987) that a court without subject matter jurisdiction (i.e., without standing) has no authority and any proceeding relative to the merits are absolutely void, with the only recourse being to dismiss the cause asserted.

As the federal court had no subject matter jurisdiction, it did not address the merits of the claims. Having not addressed the merits of the claims, which Copeland and Helms sought to have heard, no res judicata effect could arise, as the merits were not litigated before the

court. The federal court determined that the plaintiffs did not have standing to assert the claims presented and that dismissal was appropriate. Even if the claims had been exactly the same as those pending in state Circuit Court in Newton County, there was no prior litigation in federal court with a judgment on the merits, which would give rise to res judicata.

POINT IV

THE TRIAL COURT ERRED IN DENYING THE RELIEF REQUESTED IN THE COUNTERCLAIM OF COPELAND AND COUNTERCLAIM OF HELMS FOR TORTIOUS INTEREFERENCE WITH BUSINESS EXPECTANCY BECAUSE COPELAND AND HELMS (1) HAD A VALID BUSINESS EXPECTANCY IN THE FORM OF A COMMITTED EMPLOYMENT RELATIONSHIP WITH INTEGRITY HOME CARE; (2) OXFORD HAD KNOWLEDGE OF THE BUSINESS RELATIONSHIP ON THE PART OF COPELAND AND HELMS WITH INTEGRITY; (3) THE BUSINESS RELATIONSHIP ON THE PART OF COPELAND AND HELMS WITH INTEGRITY WAS TERMINATED BY REASON OF OXFORD'S INTERFERENCE WITH THE RELATIONSHIP IN BRINGING SUIT AGAINST COPELAND AND SUIT AGAINST HELMS AND WRONGFULLY OBTAINING ORDERS RESTRAINING AND ENJOINING THEM FROM PURSUING THEIR EMPLOYMENT AND BUSINESS RELATIONSHIPS WITH INTEGRITY CARE; (4) WHICH INTERFERENCE WAS WITHOUT JUSTIFICATION AS OXFORD HAD NO PROTECTABLE INTEREST UPON WHICH IT WAS ENTITLED TO ANY INJUNCTIVE RELIEF AND ITS CLAIMS WERE ASSERTED WITHOUT LEGAL JUSTIFICATION AND (5) RESULTED IN DAMAGES BEING SUSTAINED BY COPELAND AND HELMS BY VIRTUE OF THE LOSS OF THEIR EMPLOYMENT INCOME FROM INTEGRITY HOME CARE, IN THAT, OXFORD WAS OBVIOUSLY AWARE OF THE RELATIONSHIP OF COPELAND AND HELMS WITH INTEGRITY AS SHOWN BY ITS SUITS TO HAVE SUCH RELATIONSHIPS ENJOINED AND TERMINATED; THE INJUNCTIVE RELIEF

SOUGHT AND OBTAINED INJUNCTIVE RELIEF RESULTED IN A BREACH AND DISCONTINUATION OF THE RELATIONSHIP OF COPELAND AND HELMS WITH INTEGRITY, WHICH CONDUCT WAS WITHOUT JUSTIFICATION DUE TO THE FACT THAT OXFORD HAD NO PROTECTABLE INTEREST IN THE FORM OF A TRADE SECRET OR CUSTOMER CONTACT AND COPELAND AND HELMS WERE DAMAGED IN THE AMOUNT OF THE SALARY WHICH THEY LOST BECAUSE OF THE WRONGFULLY SOUGHT AND OBTAINED INJUNCTIVE RELIEF. FURTHER, DAMAGES WHICH THEY WERE ENTITLED TO RECOVER WAS NOT LIMITED TO THE AMOUNT OF THE BONDS POSTED IN EACH OF THE SUITS FILED AGAINST COPELAND AND HELMS AS THE BOND AMOUNT IN EACH CASE (THE SUM OF $7,500.00 CASH) WAS SET BEFORE ANY COUNTERCLAIM FOR DAMAGES WAS PENDING BEFORE THE COURT AND THE AMOUNT OF THE BOND SET DID NOT APPROXIMATE THE WAGE LOSS SUSTAINED FOR A TWO YEAR PERIOD BY EITHER COPELAND OR HELMS UNDER ANY CIRCUMSTANCES AND THE BOND AMOUNT WAS SET WITHOUT PRESENTATION OF EVIDENCE OF ANY KIND AND THE COURT REFUSED TO RECONSIDER AND INCREASE THE BOND AMOUNT DURING THE COURSE OF THE LITIGATION.

Standard of Review

An appeal from a judgment entered after trial before the court is controlled by the standard of review set forth in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976). The judgment of the trial court is not to be reversed unless there is no substantial evidence to support it, unless

the judgment is against the weight of the evidence, or unless the trial court erroneously declared or erroneously applied the law.

Argument

Copeland and Helms each asserted a counterclaim for tortious interference, set forth as Count I in their respective counterclaims against Oxford. (L.F. 49-55 and L.F. 56-65) The claims for tortious interference were premised upon the presumption that Oxford was not entitled to obtain any injunctive relief against either Copeland or Helms because of a lack of a protectable interest.

The elements of a tortious interference claim are well established as stated by the Missouri Supreme Court in *Rice v. Hodapp*, 919 S.W.2d 240 (Mo. 1996), at page 245: "Tortious interference with a contract or business expectancy requires proof of: (1) a contract or valid business expectancy; (2) defendant's knowledge of the contract or relationship; (3) a breach induced or caused by defendant's intentional interference; (4) absence of justification; and (5) damages."

Uncontroverted evidence of each of the elements was presented by Copeland and Helms at the time of trial.

In regard to the first element, Copeland testified that after she had resigned her position with Oxford, she had obtained a commitment from Integrity Home Care, a competitor of Oxford, to work for the same or comparable salary, which she had been receiving from Oxford. (L.F. 110, ¶ 17, Tr. 85) Helms also testified that after her resignation from Oxford, she had obtained a commitment to work for Integrity Home Care for a comparable salary to what she had been receiving from Oxford. (L.F. 111, ¶ 21, Tr. 128)

Oxford obviously had knowledge of the business relationship or expectancy of both Copeland and Helms (element 2) as evidenced by the fact that it instituted suit to prevent each of them from working with Integrity Home Care, or any other competitor. Oxford was successful in obtaining injunctive relief preventing Copeland and Helms from employment with Integrity. It is clear from the record that the second element of a tortious interference claim was proven before the court.

In regard to the third element of a tortious interference claim, the record is clear, and it is obvious, that both Copeland and Helms relationships with Integrity were terminated by reason of Oxford's interference in bringing suit against them and obtaining injunctive relief, preventing them from working for Integrity. (Tr. 86, 129)

The fourth element of a tortious interference claim, that is the lack of justification, is substantiated by virtue of the fact that Oxford knew, or at all times should have known, that it had no protectable interests upon which it could justify its claim for enforcement of the non-compete provisions of the agreements signed by Copeland and Helms. Even if Oxford believed in good faith that it was entitled to enforce the non-compete agreements against Copeland and Helms, such belief was based upon a mistake or misunderstanding of the law. Oxford remains liable in any event. A mistake or misunderstanding regarding a parties legal rights will not protect it from liability on a tortious interference claim, any more than a mistake as to a parties legal contractual obligations will excuse it for a breach of contract. Oxford was no less wrong in its conduct, regardless of whether its actions were taken in good faith. Wrongful conduct undertaken in good faith is never-the-less, wrongful conduct. Oxford's actions were without legal justification as it had no legal right to enforce the agreement signed by Copeland and

Helms which purported to allow Oxford to restrict their ability to compete by working with another employer in the same business as Oxford.

In regard to the fifth element, i.e. damages, the uncontradicted testimony at the time of trial was, that Copeland lost two years of salary (Tr. 87; L.F. 120-121) which amounted to $ 40,974.00 per year. (L.F. 109 ¶ 11; Tr. 84) Helms did obtain other employment, which was not in conflict or in violation of the court order restraining and enjoining her from competing with Oxford. As a result of her having obtained other employment, she was able to offset the damages, which she would have otherwise sustained. The uncontradicted evidence was that Helms lost her two years worth of salary, less other income which she was able to derive in the years 2000 and 2001, in the total net amount of $ 23,000.00. (Tr. p. 86, 87, 90, 120, 121, 129, and 132) Helms total damages, after mitigation by obtaining gainful employment elsewhere for two years, was in the amount of $ 23,000.00.

Oxford asserted before the trial court that the damages which Copeland and Helms sought in their counterclaims for tortious interference must necessarily be limited to the amount of the cash bonds posted by Oxford in obtaining the injunctive relief from the court. The same being a cash bond of $7,500.00 as to Copeland and a cash bond of $7,500.00 as to Helms. It is submitted that the contentions of Oxford that Copeland and Helms damages for tortious interference must be limited to the amount of the bonds posted is wrong for several reasons.

In the first instance, when the injunctive relief was obtained against Copeland, and later against Helms, there were no counterclaims pending before the court that would have allowed the court to make any determination or measure of potential damages that might be sustained.

Second, the court heard no evidence in either case at the time that it entered its order granting injunctive relief. Only argument of counsel was presented, which is not now, and never has been, evidence. Third, after the counterclaims were pending before the court, Copeland and Helms sought to have the court enter an order increasing the amount of the bonds. (L.F. 5) That request was denied by order of the court. (L.F. 6) Fourth, there was never a contention by Oxford that one year or even six months worth of salary for either Copeland or Helms would amount to only $7,500.00, although that was the amount of the bonds set by the trial court for injunctive relief granted as to Copeland and as to Helms.

It must be conceded that there is legal authority, as urged by Oxford upon the trial court, holding to the effect that a claim for damages arising by virtue of an improperly or improvidently granted injunction is limited to the amount of the bond posted to secure the injunction. *Newcourt Financial USA, Inc. v. Lafayette Investments, Inc.*, 983 S.W.2d 214 (Mo.App. W.D. 1999).

Copeland and Helms submit to the Court that authorities holding that damages recoverable for an improvidently or improperly granted injunction are limited to the amount of the bond, or a percentage of it, should not be followed, and indeed, reflect a gross mistake in application of ordinary legal principles. Such ordinary legal principles would reflect that a party=s damages cannot be limited by a court or other fact finder until an opportunity has been had to present the merits of the damage claims. Whether damages are to be determined by court, or a jury, damages should not be guessed at prior to hearing any evidence of the amount of the loss being sustained. Such procedure smacks of, and indeed, constitutes a violation of the rights of any citizen to equal protection under the law.

Following the logic of Oxford, as urged upon the trial court, and which it is anticipated it will urge again upon the Missouri Supreme Court, any trial court in which injunctive relief is initially sought would be allowed to conclusively determine the limit of all damages which might arise by virtue of the granting of preliminary injunctive relief long before any trial on the merits of the parties= claims. It should be remembered that an order granting injunctive relief is not appealable as it is interlocutory. Assuming Oxford's position is correct, any trial court which grants injunctive relief and sets a bond amount, has entered an order determining the outside limit of damages, for an erroneasly granted preliminary injunction, from which no appeal can be taken. Further, according to Oxford, the determination by the trial court of the outside limit of damages is not subject to reconsideration or review on appeal after a final judgment is entered determining the injunction to have been improper. Such cannot be the law. There is no other set of circumstances that can be cited to the Court where a trial court, or a jury for that matter, is entitled to limit damages before hearing evidence, and indeed, all the evidence which a party might bring to bear on its various claims.

Our Missouri statutes, § 526.070 RSMo. and others, do not specifically limit damage recovery to the amount of an injunction bond determined by the court. Instead, the amount of the bond is supposed to be such sum as the trial court deems sufficient to secure the matter to be enjoined. Section 526.070 actually indicates that a party obtaining an injunction may be obligated to "pay all sums of money, damages and costs that shall be adjudged against him if the injunction shall be dissolved." Our Missouri rules, specifically Rule 92.02(d) provides that any injunction bond posted by a party other than the state, shall be, " . . . in such sum as the court shall deem sufficient to secure the amount or other matter to be enjoined, and all damages that

my be occasioned by such injunction or temporary restraining order to the parties enjoined", and further " . . . conditioned that the plaintiff will abide by the decision that shall be made thereon and pay all sums of money, damages and costs that shall be adjudged if the injunction or temporary restraining order shall be dissolved." Our rules clearly do not specifically state that damages are limited to the amount of the bond.

It is respectfully submitted that the cases urged upon the trial court by Oxford, and which seemingly hold that damages arising because of a wrongfully issued injunction must necessarily by limited to the amount of an injunction bond should not be followed. Instead, it is urged respectfully that the court should embrace a much older decision by our Missouri Supreme Court addressing the same sort of issue, *Wabash R. Co. v. McCabe*, 24 S.W. 217 (Mo. 1893), wherein the Missouri Supreme Court in addressing an asserted limitation of recovery of damages for an improper or improvidently granted injunction, and statutes pertaining to the same stated, at page 218, the following:

> "In the case of *Hale v. Meegan*, 39 Mo. 272, it is said: 'In the case of *City of St. Louis v. Alexander*, 23 Mo. 483, this court undertook to give a construction of the statute which authorizes an assessment of damages in these cases." It was held substantially in that case, and we think correctly so, that the object of the statute was to fix the measure of damages where money had been actually stopped by the injunction, and not to confine the damages exclusively to that subject. It does not prevent the recovery of any other damages that the parties might have sustained by reason of the injunction, ..."

Following the theory of recovery of damages in this case, as urged upon the trial court by Oxford, would allow a species of judgment to exist, that is a damage determination by a trial court, without possibility of review, as the entry of an order granting an injunction and setting the amount of a bond is not appealable. According to Oxford's theory, the trial court order setting the amount of an injunction bond would provide a final and conclusive determination of the upper limits of any damages which might be recovered, no matter how egregious a decision by a trial court in setting the amount of an inadequate injunction bond.

The second reason why the position of Oxford, as urged upon the trial court regarding the limitation of damages to the amount of the injunction bonds is inappropriate is this: The injunction bonds do not exist! The trial court entered an order releasing the injunction bonds to Oxford on March 26, 2004, without notice and opportunity for hearing, and before any notice of appeal was filed.

There is no bond money to seek. Even if there were, it was an amount that was set by the court before hearing any claims, evidence or complaints from Copeland or Helms. The bond amounts did not approximate a year's salary of Copeland or Helms, although Oxford consistently claimed that it was entitled to have Copeland and Helms enjoined for two years. The rule of law as urged by Oxford before the trial court, is unworkable and should be readdressed. A party should not be deprived of damages on the basis of an argument before the court, without presentation of evidence.

However, such happenings are routine before the circuit courts in this state. The granting of injunctive relief should be a weighty and time-consuming matter; not treated as an administrative task or routine motion. It indeed should be a rare occurrence. It has become

fairly routine. It is handled in a perfunctory manner. If that is to be so, a party who has an injunction granted against them, without presentation of evidence, should not also be punished by having a trial court arbitrarily, finally, conclusively and without appellate review, limit their damages to the amount of an inadequate injunction bond.

The Missouri Supreme Court should now embrace the *Wabash R. Co. v. McCabe* decision from 1893 by the Missouri Supreme Court that would effectively prohibit a trial court from determining, conclusively, and without opportunity for appellate review the amount of all damages that might be sustained by the granting of an injunction improvidently or improperly.

CONCLUSION

Copeland and Helms suggest to the Court that it is appropriate for the Court to enter its order, reversing the judgment of the trial court, in part, and finding the following:

(1) Oxford held no protectable interest which would allow it to enforce its non-disclosure and non-compete agreements signed by Copeland and Helms and the injunction relief obtained by Oxford was improper;

(2) The obtaining of improper injunctive relief by Oxford constituted a tortious interference with legitimate business expectancies causing Copeland and Helms to sustain damages. The damages sustained by Copeland are the principal amount of $81,948.00 and by Helms in the principal amount of $23,000.00;

(3) Declaratory judgment requested by Copeland and Helms in Count II of their respective counterclaims should be granted in that a not-for-profit public benefit corporation in the State of Missouri is not entitled, as a matter of public policy, to restrain or enjoin competition in any form or respect.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function of Microsoft Word, by which it was prepared, contains 11,244 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block and the appendix.

The undersigned further certifies that the dskette filed herewith containing this Appellants' Substitute Brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

_____

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Certificate of Service

The undersigned hereby certifies that on the ____ day of November, 2005, one original and ten true and correct copies of the foregoing brief and a copy of the diskette containing the brief which were sent to the court as required by Rule 84.06(f) and two copies of the brief and diskette were forwarded to Mr. Rick E. Temple, 1358 E. Kingsley St., Suite D, Springfield, Missouri 65804,via:

9	United States Mail	**9**	Facsimile transfer to counsel
9	Overnight Mail	**9**	Hand delivery to courthouse
9	Certified Mail	**9**	Hand delivery to counsel

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